In the High Court of Judicature at Madras

Dated: 20.02.2006

Coram

The Honourable Mr.JUSTICE P.D.DINAKARAN
and
The Honourable Mr.JUSTICE P.P.S.JANARTHANA RAJA

C.M.A.No.594 of 2006
and C.M.P.No.2399 of 2006

Venus Enterprises
C-26, Anna Nagar East,
Chennai-600 102. .... Appellant

Vs.

1. Commissioner of Customs
Airport, Rajaji Salai, Customs House,
Chennai-600 001.

2. Customs, Excise and Service Tax
Appellate Tribunal, Southern Regional
Bench, I Floor, Shastri Bhavan Annexe,
Haddows Road, Chennai-600 006. .... Respondents

Appeal filed under Section 130 of the Customs Act against the final order No.1507/2005 dated 25.10.2005 passed in Appeal No.C/95/1999/MAS by the second respondent.

For Appellant : Mr.T.R.Ramesh
for Mr.V.Balasubramanian

J U D G M E N T

(Judgment of the Court was delivered by P.D.DINAKARAN,J)

The appeal is directed against the final order No.1507/2005 dated 25.10.2005 passed in Appeal No.C/95/1999/MAS by the second respondent, raising the following questions of law:-

(1) Whether the Tribunal was right in holding that the order of assessment on which no Appeal was preferred, can be reopened by issue of a fresh Show Cause Notice under

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Section 28A of the Customs Act, in the light of the Apex Court's decision reported in 2004(172) ELT 145 (SC) in the case of Priya Blue Industries Ltd. vs. CC ?

(2) Whether on the facts and circumstances of the case, the Tribunal was right in holding that the parallel invoices, which were dated prior to the date of Bill of Entry, can be the basis for enhancing the value, disregarding the factual position that no foreign exchange remittance has been made over and above the invoice value submitted to the Customs for assessment ?

(3) Whether on the facts and circumstances of the case, the Tribunal has acted by an outright refusal to consider the binding decision of another Co-ordinate Bench of the Tribunal, wherein it is held that the provisions of confiscation and imposition of redemption fine would not apply in respect of goods that were already assessed and cleared on payment of duty out of Customs charge ?"

2. During the course of arguments, the learned counsel appearing for the appellant seeks to modify the first question of law with regard to the Section, that instead of section 28A, it may be read as Section 28 (1) of the Customs Act. Permission granted and the first question of law can be read as hereunder:-

(1) Whether the Tribunal was right in holding that the order of assessment on which no Appeal was preferred, can be reopened by issue of a fresh Show Cause Notice under Section 28 (1) of the Customs Act, in the light of the Apex Court's decision reported in 2004(172) ELT 145 (SC) in the case of Priya Blue Industries Ltd. vs. CC ?

3.1. The brief facts of the case are as follows:-

The appellant filed 11 Bills of Entry for clearance of parts for computer and data cartridges during the year 1995-96. Of course, the declared value was accepted in respect of certain Bills of Entry. But, the value was enhanced for the remaining Bills of Entry and after assessment, the consignments were allowed clearance.

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3.2. However, on an investigation by the Directorate of Revenue Intelligence, it was found that one T.S.Mani was the proprietor of the appellant's company, viz., M/s.Venus Enterprises and he was also the Director of M/s.MBO Computers (India) Pvt. Ltd., Chennai. During the search of the premises of the importer, the following incriminating documents were recovered:-

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i) Parallel invoices indicating higher prices of the imported goods; and

ii) Cost Analysis Statement.

3.3. Based on the above documents, the revenue proceeded against the appellant under Section 28(1) of the Customs Act (hereinafter will be referred as 'the Act') and the offending goods were proposed to be confiscated and penalty under Section 112(a) / 114 A was also proposed. Section 28(1) of the Act reads as follows:-

"28. Notice for payment of duties, interest, etc.
(1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,-

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;

(b) in any other case, within six months,

from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collution or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted:

Provided further that where the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable has not been paid, part paid or erroneously refunded is one crore rupees or less, a notice under this sub-section shall be served by the Commissioner of Customs with his prior approval by any officer subordinate to him:

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Provided also that where the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable thereon has not been paid, part paid or erroneously refunded is more than one crore rupees, no notice under this sub-section shall be served except with the prior approval of the Chief Commissioner of Customs.

Explanation – Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be."

(emphasis supplied)

3.4. The only explanation offered by the appellant was that the parallel invoices and the cost analysis statement seized from the premises of the appellant were unsigned documents and they were used by them only for marketing purposes and not for evasion of duty. However, the Commissioner refused to accept the explanation offered by the appellant and held that the charges of mis-declaration and suppression of facts for the duty short-levied stand proved, in view of the parallel invoices indicating higher prices of the imported goods and the cost analysis statement seized from the premises of the appellant themselves. Since the imported goods, which were under-valued and were already allowed clearance, were liable to be confiscated, the Commissioner imposed a fine of Rs.6.8. Lakhs in lieu of confiscation and also imposed a penalty of Rs.6 lakhs under Section 112 (a) of the Act with a further demand of differential duty of Rs.24,43,415/- under Section 28 (1) of the Act.

4.1. Against the order of the Commissioner, the appellant preferred an appeal before the Tribunal and contended that the very issue of Show Cause Notice under Section 28 (1) of the Act is without jurisdiction for the reason that the demand for short-levy in the light of the investigations conducted subsequent to the clearance is not legal.

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4.2. The Tribunal rejected the said contention by holding that if the contention of the appellant that no demand notice could be issued without reviewing the order of assessment is accepted, then Section 28 itself would become redundant. On the other hand, the Tribunal took into account the admitted fact that the incriminating documents, viz., the parallel invoices indicating higher prices of the imported goods and the cost analysis statement, were seized from the premises of the appellant themselves and the said

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documents revealed that the declared value was much less than the value of the items mentioned in the parallel invoices and the cost analysis statement. In the absence of any proper and convincing explanation by the appellant, the Tribunal found that the findings of the adjudicating authority need not be interfered with.

4.3. The Tribunal also found that the cost analysis statement could not be used to enhance the invoice value in respect of the parallel invoices. But the Tribunal considered that there are two categories of parallel invoices, viz., i) parallel invoices which have been issued prior to the date of filing of the Bills of Entry; and ii) parallel invoices which have been issued after the date of filing of the Bills of Entry. Considering the above two categories of parallel invoices, the Tribunal rightly held that the parallel invoices issued after the date of filing of the Bills of Entry could not be related to the goods imported under those Bills of Entry and therefore, had directed the adjudicating authority to take into consideration the parallel invoices which have been issued prior to the filing of the Bills of Entry alone. It was further made clear that in the case of the parallel invoices which were issued after the date of filing of the Bills of Entry, the declared value would be accepted and accordingly, the Tribunal remitted the matter to the original authority and directed to recompute the duty liability. The Tribunal, however, rejected the contention of the appellant that no fine could be imposed in respect of the goods, which had already been cleared.

4.4. In fine, the Tribunal confirmed the findings of the Commissioner that there was a mis-declaration and suppression of facts and the offending goods were liable to be confiscated under Section 111 (m) of the Act and consequently, the goods, even after the clearance, are liable to be confiscated and as a result, the penalty could be imposed under Section 112 (a) of the Act. But, however, the matter was remanded back to the original authority for re-computation of the duty liability and also to enable the original authority to decide the fine and penalty to be imposed subject to the subsequent orders to be passed after re-computing the duty liability. Against which, this appeal has been preferred by the appellant.

5. From the above facts and circumstances of the case, all the questions, except question No.1, revolve on the factual findings based on the search conducted in the premises of the appellant and the seizure of the two incriminating documents referred to above and the findings rendered by the adjudicating authority as confirmed by the appellate Tribunal in that regard are purely questions of fact. Therefore, we do not propose to entertain the above appeal inasmuch as they relate to questions of fact.

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6. With regard to question No.1, the law is well settled that a show cause notice under the provisions of Section 28 of the Act for payment of customs duties not levied or short-levied or erroneously refunded can be issued only subsequent to the clearance of the goods under Section 47 of the Act vide UNION OF INDIA vs. JAIN SHUDH VANASPATI LTD. [(1996) 86 ELT 460 (SC)]. Therefore, as rightly held by the Tribunal, if the contention of the appellant's counsel that when the goods were already cleared, no demand notice can be issued under Section 28 of the Act is accepted, we will be rendering the words "where any duty has been short-levied" as found in Section 28 (1) of the Act as unworkable and redundant, inasmuch as the jurisdiction of the authorities to issue notice under Section 28 of the Act with respect to the duty, which has been short-levied, would arise only in the case where the goods were already cleared. In view of the clear finding with regard to the mis-declaration and suppression of value, which led to the under-valuation and proposed short-levy of duty, we do not see any lack of jurisdiction on the part of the adjudicating authority to issue notice under Section 28(1) of the Act.

7. Hence, finding no question of law much less substantial question of law that arises for consideration of this Court, the appeal stands dismissed. Consequently, connected C.M.P. also stands dismissed.

20.02.2006

sra

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Commissioner of Customs
   Airport, Customs House,
   Chennai-600 001.

2. The Registrar,
   Customs, Excise & Service
   Tax Appellate Tribunal,
   South Regional Bench, I Floor,
   Shastri Bhavan Annexe,
   Haddows Road, Chennai-600 006.

1 cc to Mr.V.Balasubramanian, Advocate, SR.7895

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